

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

APRIL 1995 SESSION

FILED

December 13, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

EDWARD DARNELL SELTZER,)

Appellant,)

VS.)

STATE OF TENNESSEE,)

Appellee.)

C.C.A. NO. 02C01-9410-CR-00232

SHELBY COUNTY

HON. JOSEPH D. DAILEY,
JUDGE

(Post-Conviction)

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OPINION FILED: _____

AFFIRMED

JOHN H. PEAY,
Judge

OPINION

The petitioner was convicted on June 11, 1986 of robbery with a deadly weapon. Upon a jury finding that he was an habitual criminal, he was sentenced to life in prison. His conviction and sentence were affirmed by this Court on direct appeal. See State v. Edward Darnell Seltzer, C.C.A. No. 69, Shelby County (Tenn. Crim. App. filed May 27, 1987, at Jackson). The Tennessee Supreme Court denied permission to appeal on September 8, 1987. The petitioner filed his first post-conviction relief petition in 1989, but voluntarily withdrew it on January 29, 1993. He filed the present "Petition For Writ Of Error Coram Nobis Or In The Alternative Post-Conviction Relief" on January 26, 1994, alleging that he was convicted on the basis of perjured or mistaken testimony. On March 25, 1994, "An Amended Petition For Post-Conviction Relief" was filed. On April 11, 1994, the trial court denied the petition without conducting an evidentiary hearing because it had been filed after the running of the three year statute of limitations. See T.C.A. § 40-30-102 (1990), repealed by Post-Conviction Procedure Act of 1995, ch. 207, § 1 (codified at T.C.A. § 40-30-202 (Supp. 1995)). In this appeal as of right, the petitioner contends that the trial court erred in denying his petition without conducting a hearing, arguing that his situation is analogous to the case of Burford v. State, 845 S.W.2d 204 (Tenn. 1992). We find that the trial court properly denied the petition.

In the present case, the petitioner alleges that new evidence unavailable within the three year limitation period indicates that he was convicted on the basis of perjured or mistaken testimony. Specifically, the petitioner asserts that the victim of the robbery in this case, Earnest Lane, admitted that he had mistakenly identified the petitioner as the individual who had committed the crime. At trial on June 11, 1986, Lane testified that the petitioner was the person who had robbed the gas station at which the former was then working. In May of 1987, the petitioner contends that Lane apparently realized that he had made a mistake in identifying the perpetrator of the robbery. He

informed the petitioner's trial counsel and signed an affidavit attesting to his alleged error. At a hearing on the matter¹, however, Lane recanted his recantation and instead testified that the petitioner was the individual who had robbed him. In the present petition, Lane has signed another affidavit reasserting his error in identifying the petitioner as the perpetrator. Lane now explains that he was coerced by prosecutors and the trial judge into recanting his original recantation with threats of perjury charges and jail time. In addition, the petitioner offers an affidavit from a third person, Lonnie Maxwell, to corroborate Lane. Maxwell asserts that in 1987 Lane told him that the petitioner was not the person who had robbed him and that "the only reason he [Lane] said that was because he was scaered [sic] of what the Judge might do to him if he went back on his word."

Faced with the affidavits of both Lane and Maxwell, the trial court nevertheless denied the petition without conducting an evidentiary hearing because it had been filed after the running of the statutory period. The petitioner, however, argues that his case merits an exception to the three year limitation period, citing Burford v. State to support his argument. In Burford, our Supreme Court held that although the three year statute of limitations contained in T.C.A. § 40-30-102 is facially constitutional, "it is possible that under the circumstances of a particular case, application of the statute may not afford a reasonable opportunity to have the claimed issue heard and decided." Burford, 845 S.W.2d at 208 (citation omitted).

Burford involved a defendant who had been convicted of robbery with a deadly weapon. At sentencing, the trial court used prior convictions from another county to enhance the defendant's sentence. At a later date, however, those prior convictions

¹ The petitioner could not locate the transcript of this proceeding and, thus, it is not a part of the record on appeal. The facts set forth herein are based on the petition and affidavits filed by the petitioner.

were declared void. Burford, 845 S.W.2d at 205. By the time the defendant filed for post-conviction relief from his enhanced sentence, the limitation period had already run. Burford, 845 S.W.2d at 206. Under those circumstances, our Supreme Court found that Burford had not had a reasonable opportunity to have his claim heard and decided. Burford, 845 S.W.2d at 210. The Supreme Court concluded that the governmental interests represented in T.C.A. § 40-30-102, namely the prevention of stale or fraudulent claims and administrative efficiency, were not served by applying the limitation period to bar Burford's petition. Burford, 845 S.W.2d at 208-209.

The case at bar, however, is quite different from Burford. In the present case, the petitioner's trial counsel had actual knowledge of Earnest Lane's claim of misidentification as of May 1987, the same month in which this Court affirmed the petitioner's conviction on direct appeal. Since the statutory period did not begin to run until permission to appeal was denied by the Supreme Court in September of 1987, the petitioner actually had more than three years from the time he learned of Lane's claim to file for post-conviction relief. Moreover, the petitioner did in fact receive a hearing on Earnest Lane's claim prior to the present petition, at which time Lane recanted his assertion that he had incorrectly identified the petitioner as the individual who had robbed him. Thus, the present petition, filed well after the three year limitation period, is based upon Earnest Lane's recantation of his earlier recantation of his original recantation. Clearly the petitioner's situation is not analogous to Burford and does not merit an exception to the limitation period for such a purely evidentiary matter.²

² We do recognize that the purely evidentiary matter of Lane's allegedly inaccurate testimony could possibly become a constitutional due process matter if the petitioner argued that the State had known that the testimony was inaccurate but nevertheless had used it or had allowed it to be offered uncorrected. See Roger Morris Bell v. State, C.C.A. No. 03C01-9210-CR-00364, Hamilton County (Tenn. Crim. App. filed March 15, 1995, at Knoxville) (citing Napue v. Illinois, 360 U.S. 264 (1959)). In the present case, however, the petitioner does not contend that the State knew of the supposed inaccuracy of Lane's testimony. In fact, he concedes that Earnest Lane himself did not realize his apparent error until after the petitioner's conviction.

Furthermore, we must note that the petitioner may not use post-conviction proceedings to relitigate issues disposed of in prior proceedings. See Gant v. State, 507 S.W.2d 133, 137 (Tenn. Crim. App. 1973). The petitioner's allegation that the prosecution used erroneous testimony is merely another method of challenging the sufficiency of the evidence. See Cole v. State, 798 S.W.2d 261, 264 (Tenn. Crim. App. 1990). The petitioner, however, challenged the sufficiency of the convicting evidence on direct appeal in 1987. See State v. Edward Darnell Seltzer, C.C.A. No. 69, Shelby County (Tenn. Crim. App. filed May 27, 1987, at Jackson). He may not now reopen that issue in a post-conviction relief petition simply by alleging that his conviction was based on mistaken testimony. See Cole, 798 S.W.2d at 264. Instead, the traditional remedy available to a prisoner who has convincing evidence that he or she is an innocent person convicted in a procedure that nonetheless satisfied due process is a petition to the Executive department for clemency. See Tenn. Const. art. III, § 6; Shepherd v. State, 533 S.W.2d 335, 338 (Tenn. Crim. App. 1975).

For the reasons set out in the discussion above, the judgment of the trial court is affirmed.

JOHN H. PEAY, Judge

CONCUR:

JERRY SCOTT, Presiding Judge

JOE B. JONES, Judge